Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

ALMA FAYE RUSSELL, Petitioner

v.

CITY OF DALLAS AND THE BOARD OF TRUSTEES OF THE FIREMEN, POLICEMEN AND FIRE ALARM OPERATORS' PENSION FUND OF DALLAS, TEXAS, Respondents

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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38 pp

QUESTIONS PRESENTED

(1) Whether the Circuit Court properly held that continued enforcement of a facially discriminatory pension provision was not a continuing tort and, thus, did not suspend the running of the statute of limitations.

(2) Whether Texas law or federal law controls the issue of whether a continuing tort suspends the running of the Statute of Limitations.

(3) Whether the Circuit Court properly applied federal law as to when Petitioner's Causes of Action accrued in this case.

(4) Whether the Circuit Court could properly base its decision affirming Summary Judgment below upon a judicial resolution of a disputed fact issue in favor of the movant and an invalid analysis of retroactivity.

(5) Whether the Circuit Court properly disposed of Petitioner's Cause of Action for breach of fiduciary duty through its resolution of a disputed fact issue in favor of movant.

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties in interest.

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2. The decision below erroneously determined the date of accrual of Petitioner's causes of action and such erroneous decision endangers national policies protecting individual rights and disfavoring restraints upon the fundamental right to marry by allowing the statute of limitations to block a challenge to a facially discriminatory provision that openly and obviously discriminates upon the basis of marital status . . 18

3. This Petition should be granted because this decision expands the standard for summary judgment in federal courts far beyond the standard set by this Court in the summary judgment trilogy of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex v. Catrett*, 477 U.S. 317 (1986)("Summary Judgment Trilogy") . 20

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E: Order of the United States District Court for the Northern District of Texas Granting Defendant's Motion for Summary Judgment (July 17, 1991)

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PETITION FOR WRIT OF CERTIORARI

Alma Faye Russell respectfully petitions that a writ of certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW AND GROUNDS OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit, entered August 14, 1992 and reported at 968 F.2d 489, is reprinted at pp. 1-13 of the Separate Appendix as Section A. The Order of that court denying Petitioner's Motion for Rehearing (timely filed on August 28, 1992) was entered on September 10, 1992 and is reprinted at pp. 14-15 of the Separate Appendix as Section B. The Judgment and the Final Judgment of the United States District Court for the Northern District of Texas, Dallas Division, were entered on July 17, 1991 and are reprinted at pp. 16-17 and 18-19 as Sections C and D, respectively of the Separate Appendix. The Order Granting Defendants' Motion for Summary Judgment entered on July 17, 1991 is reprinted as Section E of the Separate Appendix at pages 20-25. The Order Granting City of Dallas' Motion for Summary Judgment was also entered on July 17, 1991 and is reprinted at pp. 26-29 as Section F of the Separate Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.S. § 1254(1).

CONSTITUTIONAL, STATUTORY AND PENSION PLAN PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1 is printed verbatim as Section G of the Separate Appendix on page 30.

Section 1983, 42 U.S.C. § 1983 (1982) is printed verbatim as Section H of the Separate Appendix on p. 31.

Section 6.07 of Plan B as it existed on the date of death of Petitioner's husband is printed verbatim at pp. 32-36 of the Separate Appendix as Section I.

The 1988 Amendment to Section 6.07 of Plan B is printed verbatim at pp. 37-39 of the Separate Appendix as Section J.

Section 6.07 of Plan B as it existed after the April 21, 1988, amendments became effective is printed verbatim at pp. 40-46 of the Separate Appendix as Section K.

STATEMENT OF THE CASE

Petitioner, Alma Faye Russell, is a 68 year old widow who was married for more than forty years to Robert George Russell ("Mr. Russell" hereinafter), an assistant chief in the Dallas Fire Department. Mr. Russell had retired on July 2, 1976 as a member of the Firemen, Policemen and Fire Alarm Operators Pension ("Fund") under Plan B, one of the payment plans available as an option to Members of the Fund. After Mr. Russell's death in 1981, Mrs. Russell was paid benefits by the Board of Trustees for the Fund ("Board") "as a qualified surviving spouse" pursuant to the terms of Plan B (See Undisputed

spouse" pursuant to the terms of Plan B (See Undisputed Facts, Plaintiffs Motion for Summary Judgment and Brief, (R. Vol. III, p. 003, Entry 47).

When Mrs. Russell remarried in 1986, the Board began withholding her benefits pursuant to the provision of Plan B that imposed a marital status condition on the right to continue to receive benefit payments under the Plan, i.e., the payments stopped upon remarriage. Mrs. Russell did not contest the Board's action in withholding her benefits at that time. Mrs. Russell was subsequently divorced and wrote a letter to the Board requesting continuance of her benefits; that request was informally denied.

The Plan was amended, effective April 21, 1988, and the marital status condition on the right to continue to receive benefits under the Plan was removed. Mrs. Russell requested an evidentiary hearing pursuant to Section 6.07(d)(3) of Plan B to present to the Board evidence as to the reasons that her benefits should be continued. (R. Vol. III, p. 141, Entry 47) Section 6.07 (d)(3) reads as follows: "Any surviving spouse whose benefits are being withheld may demand a hearing before the Board and present testimony to show why his benefits should be continued. Following such a hearing, the decision of the Board regarding benefits shall be final."

That request was granted by letter dated February 15, 1989. (R. Vol. III, p. 142, Entry 47).

Counsel for Mrs. Russell made several arguments at the hearing, including the argument that Mrs. Russell was currently entitled to payment of benefits for the remainder of her life under the clear terms of Plan B, as amended. After some discussion among the Board members and legal counsel for the Board, the Board decided to defer its decision on Mrs. Russell's claim to allow the Fund's

attorney time to research the issue. The Board subsequently notified Mrs. Russell by letter that a decision would be deferred because the Fund's attorney had resigned and the Board was in the process of retaining new legal counsel. (R. Vol. III, p. 143, Entry 47)

On May 11, 1989, the Board finally denied Appellant's request for benefits, such denial allegedly based upon "the plan language which requires that in order to be eligible for the lifetime survivor benefit, you must have been receiving a survivor benefit on April 21, 1988, which was the effective date of the amendment." (R. Vol. III, p. 144, Entry 47). There is no such language in the Pension Plan, either prior to, or after, the 1988 amendments. As noted above, pursuant to the terms of Plan B, the Board's action in withholding Mrs. Russell's survivor benefits became final only following the evidentiary hearing when the Board made its decision regarding benefits.

Petitioner filed suit in the United States District Court for the Northern District of Texas on May 10, 1990, seeking a declaratory judgment and both injunctive relief and damages for denial of her benefits under Plan B of the Fund in violation of state and federal public policy; 42 U.S.C.A. § 1983; the Fourteenth Amendment to the United States Constitution; Article XVI, Section 67(c) of the Texas Constitution, and the clear terms of Plan B itself, as amended.[1] Discovery commenced, but before the close of discovery, Defendants each filed Motions for Summary Judgment and Petitioner filed a Motion for Partial Summary Judgment only as to her contract claim based upon the 1988 amendment. On July 19, 1991, the United States District Court for the Northern District of Texas, Dallas Division,

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[1]The District Court has jurisdiction pursuant to 28 U.S.C. §1331.

entered an Order Granting Defendant's Motion for Summary Judgment on the basis that Petitioner's federal claims were barred by the statute of limitations and the Petitioner lacked standing to make claims based on events and amendments to the Plan after that date of her remarriage on April 26, 1986. On that same date the Court issued an Order Granting City of Dallas' Motion for Summary Judgment on the basis that the City of Dallas and the Board of Trustees are distinct entities and that the Board of Trustees has the sole responsibility for administering the fund. The District Court did not address Petitioner's claim that the denial of benefits based on marital status was a "continuing violation." The Court also entered its Final Judgment and Judgment on July 17, 1991 dismissing the case with prejudice as to the Board of Trustees and the City of Dallas, respectively.

Petitioner filed her notice of appeal on August 7, 1991 and the circuit court affirmed both Summary Judgments, although in part on different grounds. The Circuit Court purported to apply the *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir.) *cert. denied*, 479 U.S. 868 (1986) standard and concluded that the continuing violation theory did not apply and that the statute of limitations had run as to all of Petitioners pre-1988 claims. The Court then considered some, but not all, of the record evidence as to the facts surrounding 1988 Amendments and resolved a disputed fact question in favor of movant to sustain the Summary Judgments against Petitioner. The Court went beyond the terms of the Plan to examine some, but not all, of the extrinsic evidence as to the intent of the members (firemen and policemen) when they approved the amendment and concluded that the amendment did not apply to Petitioner. However, such resolution of disputed facts only strengthened Petition's breach of fiduciary duty claim, which could only have accrued when the Board reached its

final decision that the amendment did not apply to Petitioner on May 11, 1989, within one year of the date Petitioner filed suit.

REASONS FOR GRANTING THE WRIT

1. The circuit court's determination that Petitioner's challenge to the continued enforcement of a facially discriminatory pension plan provision is barred by the statute of limitations is in direct conflict with the direction given by this Court in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) and is also in conflict with standards set by the Ninth Circuit and the Sixth Circuit for continuing violations.

The circuit court's decision is also a misapplication of the Fifth Circuit standard for continuing violations established in *Berry v. Board of Supervisors*, 715 F. 2d 971 (5th Cir. 1983) *cert. denied*, 479 U.S. 868 (1986). This case has far greater impact than just the impact on Petitioner and other similarly situated widows because it undermines the development of a unified standard for determination of a continuing violation.

As one commentator has very recently stated:

> "Notwithstanding the efforts of this Comment to clarify it, the law of continuing violations remains in a state of confusion, particularly among the different circuits.
>
> ...
>
> The Court's decision in Lorance clarified its position on facially neutral seniority systems, and this reasoning should extend to all facially neutral employment policies. However, the Court should

> not hesitate in granting certiorari to reinforce its statement in Lorance that a facially discriminatory seniority system could be challenged at any time. Correspondingly, this reasoning should extend to all discriminatory employment policies that continually injure employees." [footnotes omitted] Reid, *Comments: Confusion in the Sixth Circuit: The Application of the Continuing Doctrine to Employment Discrimination*. 60 U. Cin. L. Rev. 1335, 1362 (1992).

Certiorari should be granted in this case for the purpose of reaffirming this Court's statement in the *Lorance* case that: "There is no doubt, of course, that a facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged at any time ..." 490 U.S. 900, 912 (1989). Such ruling would go a long way toward providing the much needed clarity on the question of continuing violations called for by the Commentator above.

The provision at issue here, Section 6.07 of Plan B of the Dallas Firemen, Policemen and Fire Alarm Operators Pension Fund (See Section I of the Separate Appendix at pages 32-36) clearly conditions the continuation of benefits for surviving spouses on marital status. Section 6.07 of Plan B was amended, effective April 21, 1988, to remove the discriminatory "remarriage" condition to continuation of benefits. (See Section J of the Separate Appendix at pages 37-39). The Plan, as amended, is now facially neutral. However, the circuit court held that the Board correctly decided that the amendment only applied to those widows who were receiving benefits on the effective date of the amendment.

The action of the board in drafting the 1988 ballot language and subsequently determining that the amendment would not apply to those widows who had already been the victims of the facially discriminatory marital status condition withholding of benefits constituted a new act of discrimination and a breach of Board's fiduciary duty to treat similarly situated widows in the same manner. Instead, in drafting the ballot language, and in their subsequent decision to apply the amendment for some widows whose rights had already vested, but not for Petitioner, the Board breached their fiduciary duty to Petitioner and others and established anew that they were continuing to apply their systemic policy of discrimination on the basis of marital status.

Application of the statute of limitations to a challenge of the continued and renewed application of a facially discriminatory plan provision is clearly erroneous in view of this Court's direction in the *Lorance* case. It works a manifest injustice on the Petitioner and other similarly situated individuals because they are being denied benefits month after month because of marital status. In that respect, this situation is like an equal pay case, such as *Bazemore v. Friday*, 478 U.S. 385 (1986); the discrimination reoccurs as each monthly benefit payment comes due, but is not paid, because of marital status.

The decision in the circuit court below conflicts with the standard for continuing violations that has been adopted by the Sixth Circuit and the Ninth Circuit. In *Dixon v. Anderson*, 928 F.2d 212, (6th Cir. 1991) also a pension case, the court held that even where an "overarching policy" of alleged discrimination had been proved, there still must be a specific allegedly discriminatory act against plaintiff within the relevant limitations period measured back from the date of the complaint.

Here, there was just such a specific discriminatory act. The Board drafted and submitted to the members for approval an amendment that removed the marital status condition from the Pension, Plan B. Pursuant to the terms of the Pension, Plan B, Petitioner requested and was granted an evidentiary hearing as to continuation of her benefits. The Board deliberated for two months before denying Petitioner's claim to benefits on the basis of the amendment on May 11, 1989. Petitioner filed her lawsuit on May 10, 1990, within one year from the date of the Board's final denial of benefits and well within any of the applicable statutory periods for any of Plaintiff's causes of action. The Board's refusal to apply the amendment for Petitioner's benefit while applying it for the benefit of others who vested prior to the effective date of the amendment constituted a new, but related, act of discrimination that occurred on May 10, 1989. Such new act of discrimination, when considered in the context of the facially discriminatory Plan B language that was the basis for the initial withholding of benefits clearly demonstrates both the existence of an "overarching policy" and a specific allegedly discriminatory act against Petitioner within the statutory period. Thus, this case satisfies all of the "continuous violation" requirements set forth by the Sixth Circuit in *Dixon v. Anderson*, 928 F.2d 212 (6th Cir. 1991).

Those same facts satisfy the Ninth Circuit requirement for a "systemic violation". In *Green v. Los Angeles City Superintendent of Schools*, 883 F. 2d 1472 (9th Cir. 1989), the court held that a continuing violation could be established by demonstrating a series of related acts against a single individual. Here, there have been two specific acts of discrimination on the basis of marital status against Petitioner: the first when her benefits were initially withheld in 1986 and the second on May 10, 1989, when the Board ruled that the amendment removing the marital

condition did not apply to her. While both of those discriminatory acts became final on the same date, May 10, 1989, such acts were still two separate decision points and actions taken by the Board at different times, constituting two separate discriminatory acts. Thus, Petitioner qualifies under the *Green* standard because there have clearly been two discriminatory acts against Petitioner, the first initially occurring in 1986, but only becoming final in 1989; the second initially occurring and becoming final in 1989.

Under *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983) *cert. denied*, 479 U.S. 868 (1986) wherein the much more stringent Fifth Circuit standard is explained, Petitioner should also have prevailed. Even if the initial withholding of benefits in 1986 could be viewed as having sufficient finality to have triggered Petitioner's awareness of and duty to assert her rights, the amendment to the Plan in 1988 certainly raised a question as to whether it created a new and independent claim for benefits for Petitioner under Plan B. The Board's decision in drafting the ballot language and in interpreting the amendment not to apply to those who had already remarried constituted a new act of discrimination that should have satisfied the *Berry* standard.

Based upon the language of the 1988 amendment to Plan B, Petitioner surely was entitled to at least litigate the question as to whether that amendment created a renewed right to benefits for Petitioner under Plan B. Yet, the United States District Court for the Northern District of Texas ruled that Petitioner had no standing to litigate that issue and the Fifth Circuit Court simply resolved that fact issue in movant's favor to sustain a summary judgment against Petitioner on that issue.

A Fifth Circuit case clearly demonstrates the factual distinction between claims based upon past pension rights

and claims based upon present pension rights and the impact on standing of those two different types of claims. *Joseph v. New Orleans Elec. Pension*, 754 F.2d 628 (5th Cir. 1985), *cert. denied*, 474 U.S. 1006 (1985).[2] In that case a group of retirees accepted lump sum retirement benefits in lieu of a continuing monthly benefit that might have yielded a smaller sum. More than seven months after they made their lump sum election, the Trustees amended the pension plan to increase benefits eight fold, but made the amendment retroactive for only the prior seven months. A group of lump sum retirees who retired prior to that seven month period filed suit ("Plaintiff-Retirees"). The Plaintiff-Retirees in the *Joseph* case were found not to have standing as a "participant" or "beneficiary" under the specific

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[2]Although the *Joseph* case is a case under the Employee Retirement Income Security Act of 1974 (ERISA), Petitioner does not now, and has not in the past, taken the position that the Fund is subject to ERISA. However, the legal theory in ERISA cases certainly can be applied to non-ERISA cases,if it fits the fact situation. The facts in the *Joseph* case are comparable to the facts of this case, except that language of the *Joseph* Plan was explicit as to which retirees were affected by the Amendment and the Plan B language here is not explicit. The *Joseph* case is used to demonstrate that, whereas there was no doubt that the Non-Plaintiff Retirees in that case were covered by the explicit terms of their Plan, their standing to challenge denial of benefits under that amendment arose only at the time the amendment became effective. Here, Petitioner's standing to litigate her claim that she is covered by the terms of that amendment also arose only upon the effective date of the amendment. This analogy does not rely upon the specific provisions of ERISA, but upon the legal reasoning applied to facts created by ERISA. That legal reasoning is applicable here.

provisions of ERISA because they had retired more than seven months prior to the amendment, had accepted all benefits due them under the plan as a lump sum and, therefore, had no reasonable expectation of present or future benefits.[3]

Consider, however, the lump sum retirees in the *Joseph* case who had retired within that seven month period ("Non-Plaintiff Retirees") prior to the amendment that allowed them to receive the increased benefits. They, too, had received all benefits due them under the terms of the plans as of the date that they received their lump sum. At that point, they would have had no standing to challenge changes to the plan after that time, if those changes did not affect them. However, the amendments restored their standing as of the date of the amendment because the amendments gave them a present right to benefits under the Plan. Prior to the effective date of the 1988 amendment, Petitioner's position in regard to standing was just like that of the Non-Plaintiff Retirees in the *Joseph* case during the seven months prior to the amendment to their plan; like those Non-Plaintiff Retirees, her standing to claim a present right to benefits pursuant to the amendment arose on the effective date of the amendment.

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[3]However, the Court in the Joseph case stated that: "Nor do we speak to whether lump-sum retirees might state a claim for relief under ERISA on either the contractual basis that a plan prohibits unequal retroactive distribution of benefits or the statutory basis that trustees are not to discriminate within classes of participants or beneficiaries." 754 F.2d 628, 630. As earlier noted, the Court below also sustained Summary Judgments as to Petitioner's Constitutional claims of discrimination and unequal treatment under law, as well as Petitioner's claim for breach of fiduciary duty.

Appellant's claim of a second independent, though related act of discrimination in this case is based on the thesis that, like the Non-Plaintiff Retirees in the *Joseph* case, who accepted their lump sums within the seven month window, she is, or arguably could be, the beneficiary of a new right under the Plan. The 1988 amendments appeared to establish her right to receive benefits prospectively if one just considers at the clear words of Plan B as amended.[4]

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[4]The relevant part of Plan B, Section 6.07 (d)(1) reads as follows:

"(d) Survivor benefits shall be paid to all qualified survivors of members of this pension plan subject to the following conditions:

...

The qualified surviving spouse shall be eligible to receive benefits for the remainder of such survivor's life."

The requirements for a "qualified surviving spouse" are spelled out in Section 6.07 (c)(1), which reads as follows:

"Qualified survivors or members of this Plan who shall be eligible for survivor benefits shall include the following:

(1) The surviving spouse of the member, providing the marriage took place before the member ended his employment with either department, either voluntarily or involuntarily, and further provided that the surviving spouse was legally married to the member at the time of the member's death."

It is undisputed that Petitioner was married to Mr. Russell for the entire thirty-four years that he was employed by the Dallas Fire Department and was married to Mr. Russell at his death.

The holding of the Trial Court below denied Appellant the right to litigate her claim of a present right to benefits under the Plan, merely because her benefits had been terminated at an earlier date under a facially discriminatory provision and the Board, after careful deliberation, decided to continue its enforcement of that facially discriminatory provision.

The Fifth Circuit did not reach the issue of standing because the court examined some, but not all, of the extrinsic record evidence regarding passage of the amendment to conclude that "No fair reading of either the Plan B amendment or the ballot could result in the conclusion that the amendment was applicable to anyone other than a surviving spouse receiving benefits on the effective date of the amendments, "i.e. April 21, 1988." Such erroneous conclusion cannot be supported by a single word in the actual Amendment to Section 6.07 of Plan B of the Fund. [See Section K of the Separate Appendix at pages 40-46. Nor is it supported by any part of the amendment package sent to Members in advance of the vote on the amendments, (R. Vol. II, pp. 389-416, Entry 50, *Response and Brief in Opposition to Plaintiff's Motion for Summary Judgment*), except for one line on the Ballot itself. The first item in that package, a letter to Members announcing proposed amendments, dated March 18, 1988, states that: "A short description of each proposed amendment follows. This is only a synopsis. Please read the actual Plan language for details." The short description, referred to above, for Ballot Item 6, (the amendment at issue here) reads as follows:

"Ballot Item 6

This amendment allows surviving spouses to continue receiving their benefits for life, regardless of whether or not

they remarry. Currently, if they remarry, their benefit is stopped."

The establishment of a new and independent cause of action, based upon the Board's decision to continue to apply the facially discriminatory marital status condition against Petitioner and other similarly situated widows is not dependent upon Petitioner prevailing on her claim that she was entitled to benefits under the Plan, as amended. All that is required is that the amendments created a colorable claim that Petitioner was entitled to benefits pursuant to the amendment. If Petitioner had even a colorable claim that the amendment created a renewed right for her to draw benefits under Plan B, then the Board's action in deciding, after serious deliberations to continue to enforce the marital status condition against her was a new and independent, though closely related, act of discrimination. The clear words of the Plan, as amended, created a more than colorable claim that the amendment gave Petitioner a new right to benefits under the Plan. Therefore, Petitioner's second cause of action accrued on May 10, 1989 when the board denied her claim to benefits under the 1988 amendment. Such Board action also established a continuing pattern of serial and systemic discrimination on the basis of marital status.

Thus, there are clearly two separate and distinct (although related) acts of discrimination taken by the Board of Trustees against Petitioner. The first occurred in 1986 when her benefits were initially withheld because of her remarriage. That initial act of discrimination was on the basis of a clearly stated, facially discriminatory, Plan provision. The second act of discrimination when the Board, after careful consideration of Petitioner's more than colorable claim to be entitled to benefits under the clear terms of the Plan, as amended, denied that claim, too.

This was not a situation analogous to the facts in *Delaware State College v. Ricks*, 449 U. S. 250 (1980), where the initial denial of tenure was the sole discriminatory act. Here, the Board was required by the terms of Plan B to give Petitioner opportunity for hearing and its initial discriminatory act of withholding of benefits, according to Section 6.07 of Plan B, did not become final until after the Board conducted the Section 6.07 (d)(3) hearing and finally responded to that request for continuation of benefits.

Further, the Board's active consideration of Petitioner's claim at the Section 6.07 (d)(3) evidentiary hearing and its deliberations on at least one and perhaps two other occasions, resulting in the decision that the 1988 amendment did not apply to Petitioner and that the Board would continue to enforce the remarriage condition against Petitioner, constituted a separate and distinct act of discrimination that gave rise to a new and independent cause of action well within the statutory period. In such respect, this case is much like *Griffen v. Big Spring Independent School District*, 706 F.2d 645 (5th Cir. 1983) *cert. denied*, 464 U.S. 1008 (1983) where a school teacher was notified by the local board of education that his contract would not be renewed. He subsequently sought a hearing and the school board provided him with a hearing, but refused to take any action that would lead to a renewal of his contract.

Similarly, in this case, the initial act of discrimination could be described as beyond the statute of limitations date (if it were deemed to be final in 1986); but the hearing date was well within the limitations period. The court in the *Griffen* case held that, because the Board was by its own rules obligated to provide a hearing and because the decision to preserve the status quo may have been discriminatorily motivated, the teacher had alleged a cause of action accruing on the date of the hearing that would

withstand a plea of limitations. In that case, the school board merely took no action at the hearing, allowing the earlier decision to stand.

In Petitioner's case, the Board was also required by the terms of Plan B to provide a hearing. Here, though, the Board deliberated about Petitioner's claim on at least two occasions and made the affirmative decision to continue to discriminate on the basis of marital status. Thus, Petitioner's case establishing a second discrete (though related) act of discrimination within the statutory period is much stronger than the Plaintiff's case in *Griffen*, because the Board actively deliberated and finally denied Petitioner's claim at the May 10, 1989 meeting, rather than just taking "no action" as did the school board in the *Griffen* case.

Even though it determined that a continuing violation had not been proved, the circuit court should have reached the same result here as in the *Griffen* case. The circuit court did not reach that result because of the Court's factual determination that "no fair reading of the Plan B amendment or the ballot could result in a conclusion that the amendment was applicable to anyone other than a surviving spouse receiving benefits on the effective date of plan amendment."

Such conclusion was not so rapidly reached by the Board itself. As previously stated, the Board tabled the request at the March meeting for further deliberations and did not reach a final decision until the May 10, 1989 Board meeting.

Any truly "fair" reading of the 1988 amendment would have to conclude that the purpose of the amendment was to correct the facially discriminatory aspect of the Plan. One would not readily assume then, that the replacement language would be intended to perpetuate the facially

discriminatory provision as to some, but not all, widows who had already vested under the Plan, prior to the date of the amendment.

2. The decision below erroneously determined the date of accrual of Petitioner's causes of action and such erroneous decision endangers national policies protecting individual rights and disfavoring restraints upon the fundamental right to marry by allowing the statute of limitations to block a challenge to a facially discriminatory provision that openly and obviously discriminates upon the basis of marital status.

The Board's initial discriminatory act of withholding Petitioner's benefits because of her remarriage did not become final until May 10, 1989. Petitioner did not exercise her Plan B right to challenge that initial denial of her benefits in 1986 until she requested an evidentiary hearing in 1989. Under the terms of Plan B as it existed at the death of Petitioner's husband, (Separate Appendix, pages 32-36, Section I) and Plan B, as amended, (Separate Appendix, pages 40-46, Section K), Petitioner was at all times entitled to an evidentiary hearing before the Board if she wanted to challenge the withholding of her benefits. There is no time limit on that right to demand and receive a hearing before the Board and Plan B clearly states that "Following such a hearing, the decision of the Board regarding benefits shall be final." (Id.). Thus, even the initial withholding of benefits in 1986 did not become final, under the terms of Plan B, until after the evidentiary hearing and final denial of benefits by the Board on May 10, 1989.

On that date, Petitioner argued that the initial withholding of benefits was a denial of her constitutional rights, but also argued that under the terms of the Plan, as

amended, she was presently entitled to benefits under the Plan, irrespective of the merits of her claim that the initial withholding of benefits was unlawful. The Board issued a final ruling on all of Petitioner's claims on May 10, 1989.

Federal case law supports Petitioner's position that all of her causes of action accrued on May 10, 1989. Petitioner, at her husband's death, vested under the terms of the Fund, Plan B and became the beneficiary of that express trust. In order to start the statute of limitations running against an express trust, there must be a clear and continuing repudiation of the right to trust benefits. *Kosty v. Lewis*, 319 F.2d 744, 750 (D.C. Cir. 1963) *cert. denied*, 375 U.S. 964 (1964). That clear and continuing repudiation of the right to trust benefits did not occur in this case until May 10, 1989. Pursuant to the terms of Plan B, Section 6.07 (d)(3), the Board's initial action in withholding benefits from 1986 forward and its subsequent decision to refuse application of the 1988 amendment for benefit of Petitioner both became final on that date. Petitioner filed suit within one year from that date, well within all statutory periods found applicable to this case by the lower courts.

The right to marry is a fundamental right.[5] The Firemen, Policemen and Fire Alarm Operator's Pension Fund is not the only pension fund that provides for widows to lose their pensions upon remarriage. If this Court reverses the decision below and returns this case to the trial court for trial, such ruling will not, of course, automatically invalidate such marital condition clauses. But it will render such clauses subject to judicial scrutiny to determine if, in fact, such discrimination is justified based upon factors such as those identified by this Court in *Califano v. Jobst*, 434

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[5]*Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

U.S. 47 (1977). If, as here, the Fund has prospered and benefits are being continually increased, then such discrimination cannot be justified, particularly when weighed against the national policy.

3. This Petition should be granted because this decision expands the standard for summary judgment in federal courts far beyond the standard set by this Court in the summary judgment trilogy of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex v. Catrett*, 477 U.S. 317 (1986)("Summary Judgment Trilogy"). The circuit court in this case went beyond resolution of legal issues in resorting to consideration of extrinsic evidence to determine the intent of the firemen and policemen who voted on the 1988 amendment for the purpose of construing Plan B of the Fund. The circuit court also erroneously based its decision on the "post-1988 claims" on the flawed application of a retroactivity analysis to the facts of this case.

Three separate documents were distributed to the Members prior to the vote approving the amendment to Section 6.07. (R.Vol. II, pp. 389-416, Entry 50, *Response and Brief in Opposition to Plaintiff's Motion for Summary Judgment*). The Fifth Circuit considered one of those documents, the ballot, and concluded that the "intent" was for the amendment to apply only to widows receiving benefits on the effective date of the Plan. The court also applied a "retroactivity" analysis to support that conclusion.

Based upon that conclusion, the Court found all of Petitioner's "post 1988 complaints" to be time barred. Such analysis is fatally flawed for at least three reasons. *First*, the Court improperly resorted to evidence extrinsic to the terms of the Plan itself to construe the Plan. Interpreting a

writing that is unambiguous is clearly a question of law. *Sherman v. Mutual Benefit Life Ins. Co.*, 633 F.2d 782, 784 (9th Cir. 1980). But where the intent of the parties to an ambiguous writing is at issue and the evidence is, as here, in conflict, there is an issue of fact. *Laborer's Health and Welf. Tr. Fund v. Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983). Here, although the circuit court never pronounced the language of Plan B to be ambiguous, it resorted to extrinsic evidence (the ballot) to construe the terms of the Plan. However, this is a situation where different inferences could be drawn from a careful evaluation of the documents submitted to the firemen and policemen as to the intent of those members in voting for the 1988 amendment. Thus, determination of that intent was a fact question which the circuit court improperly resolved in favor of the moving party to sustain the summary judgments against Petitioner.

The "intent" in this case, like in a labor negotiation case, is a combination of the intent of the Members in voting on the Plan and the Board's intent when they drafted the amendments. In order to fairly determine the intent of the Members in passing the amendment, all of the materials submitted to the members would have to be considered and all of those materials were in the Record. However, the Court reached its decision based only on a note on the ballot which might be indicative of the Board's intent, but which, standing alone, cannot resolve the fact issue as to what each member understood and intended when he/she voted on the 1988 amendment. The actual Plan language or the actual amendment itself (lining out the remarriage condition) could not have been considered because there is nothing in the simple deleting of the words embodying the marital condition in Plan B that would have given anyone any indication that it would apply for some widows whose rights under Plan B had previously vested, but not for all such

widows. Nor was the "Ballot Explanation" directive to the Members explicit on that point. It read:

> "The following is just a summary to explain each ballot item. For exact details and Plan language, please refer to the Plan sections listed under each ballot item."

The summary for Ballot Item No. 6 reads as follows:

> "This amendment allows surviving spouses to continue receiving their benefit for life, regardless of whether or not they remarry. Currently, if they remarry, their benefit is stopped."

The notation at the top of the Plan Section to which the Ballot Explanation directed members reads as follows:

> "(The following changes made herein shall apply to all current Plan B active members, retirees, and survivors; the effective date of the amendment is _____, ____, 1988 (the date that the Board certifies the election results). (See Separate Appendix, pp. 37-39, Section J)."

Nothing in the actual Plan language limits applicability of the amendment to those receiving benefits on the effective date of the amendment. To go beyond the clear language of the Plan itself for the purpose of determining the intent of the Members in passing the amendment, one would need to know the sequence in which the materials were received, whether Members studied and discussed the materials, whether Members just followed the Board's instructions to go to actual Plan language, etc.

Not all of that evidence as to sequence and effect was before the Court below, but all three of the documents submitted to the Members were in the official record. It is a very dangerous precedent to set when the court substitutes its judgment for a jury on a crucial issue, especially when that judgment is based upon only a part of the record evidence and the court then resolves that disputed fact issue in favor of the movant to sustain a summary judgment.

Second, the Court's "retroactivity" analysis is flawed because it is the date of vesting that determines applicability of plan changes, not the monthly receipt of benefit checks. Thus, if the 1988 amendment is being applied for benefit of widows whose husbands died prior to 1988, then it is being applied retroactively. As the Board itself argued in page 29 of its circuit court brief herein, Petitioner's rights under the plan became "fixed and determined upon her husband's death in 1981." If that is true, then it is also true for all other widows whose husbands died prior to 1988.

Yet, according to the circuit court's ruling upholding the Board's administration of Plan B based upon a notation of effective date on the ballot, that amendment *is* today being retroactively applied for other widows whose rights became "fixed and determined" on the dates of their husband's deaths prior to April 21, 1988, so long as they were still receiving benefits on April 21, 1988 or after. The denial of benefits to one widow whose rights became "fixed and determined" in 1981 cannot be justified based upon case law regarding retroactivity of statutes, when other widows whose rights also vested in 1981 are being given benefit of the amendment.

The 1988 amendment must either apply for benefit of all widows who vested prior to 1988 or it does not apply for any widows who vested prior to 1988 under the clear

rules of construction set out in each and every one of the pension cases cited by the Board below.[6] Under applicable Texas case law on retroactivity involving this very Fund, the 1988 amendment would not be deemed unconstitutionally retroactive merely because it conditions present payment of benefits on past events. *Byrd v. City of Dallas*, 6. S.W.2d 738 (Tex. Com. App. 1928); and *City of San Antonio v. Baird*, 209 S.W.2d 224 *writ ref'd.* (Tex. Civ. App. San Antonio 1988).

The Court's retroactivity analysis is flawed because it erroneously focuses on the receipt of monthly checks instead of the date of vesting to determine retroactivity. It proclaims that the 1988 amendment cannot apply for benefit of Petitioner because such application would be retroactive, without recognizing that the Board's present application of the 1988 amendment for benefit of other widows who vested prior to 1988 is also retroactive. Thus, it cannot be argued that there was no "intent" for the amendment to be applied retroactively, if the Board's present manner of administering the Plan is to be upheld.

Finally, the Court's conclusion is also clearly erroneous because it ignores Petitioner's breach of fiduciary

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[6]See, for example, *Burgess v. City of Detroit*, 102 N.W.2d 483 (Mich. 1960), *Miner v. Stafford*, 157 N.E. 164 (Ill. 1927), *Linaka v. Firemen's Pension Fund of Philadelphia*, 31 A.2d 122 (Pa. 1943) and In Re *Ross*, 207 P.2d 254 (Okla. 1948), holding that pension terms become fixed for widows on the date of the member's death; See also *Atchison v. Retirement Board of Police Retirement System of Kansas City*, 343 S.W.2d 25 (Mo. 1960), and *Pitts v. City of Richmond*, 366 S.E.2d 56 (Va. 1988), holding that pension terms become fixed on the date of the member's retirement.

duty claim. The trustees had a fiduciary duty to Petitioner to treat her in the same manner as they treated other similarly situated widows.[7]

Therefore, even if the Court correctly determined that the amendment could not have been applied retroactively, such ruling still would not dispose of Petitioner's breach of fiduciary duty and unequal treatment causes of action that only accrued on May 10, 1989, when the Board finally denied the benefits of the amendment to Petitioner, while applying that amendment for benefit of other widows whose benefit rights under the Fund had also vested prior to the effective date of the amendment.

In drafting the language of the amendment and then interpreting it to apply only to those still receiving benefits on the effective date of the amendment, the Board treated Petitioner and the few other widows who had remarried prior to that date differently from other widows whose rights under the Plan had vested on or about the same date as the widows who had remarried. As the Board construes the Plan, the widow of a Member who went to work on the same date as Petitioner's husband, paid in the same contributions, retired on the same date and died on the same date as Petitioner's husband, could have her benefits continued despite her remarriage, while Petitioner is being denied benefits on the basis of her remarriage. The only difference between the two situations would be the date of remarriage. That cause of action for a breach of fiduciary duty and unequal treatment under Section 1983 did not arise until the amendment was passed and was interpreted by the Board not to apply to widows who had remarried prior to the effective date of the amendment, but to have application

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[7]*Kosty v. Lewis*, 319 F. 2d 744 (D.C Cir. 1963) *cert. denied*, 375 U.S. 964 (1964).

for benefit of other widows whose rights had also vested prior to the date of the amendment, but who had not yet remarried.

The Board has cited numerous cases where benefits had been changed for some, but not all retirees. However, in all of those cases the applicability of the changes were tied to the date of vesting, not to whether benefits were being received on the effective date of the change.

The trial court's decision that Petitioner had no standing to challenge that inequity once her benefits were discontinued was just as erroneous as the Fifth Circuits' resolution of disputed facts to reach the same result. As the Board itself argued on page 29 of its circuit court brief, Petitioners rights under the Plan were set when she vested at her husband's death. It is the date of vesting that controls the applicability of plan provisions. Yet the Board, apparently for its own convenience, simply applied the 1988 amendment for benefit of all who were currently receiving benefits on the effective date of the amendment, even though their rights, as well as Petitioner's rights under the Plan, had been set by the terms of the Plan as it existed on the date of their husband's deaths. That disparate treatment did not occur until after the effective date of the amendment and was not final until Petitioner's claim for benefits under the 1988 amendment was finally denied on May 10, 1989.

If, in fact, the circuit court is right that the 1988 amendment, as approved, applies for benefit of all widows receiving benefits on that date, but not for Petitioner and others who remarried before that date, then such ruling adds strength to Petitioner's breach of fiduciary duty claim. It certainly cannot be said to dispose of that claim because it clearly establishes that the Board in drafting the 1988 amendment documents and in ruling on Petitioner's claim to

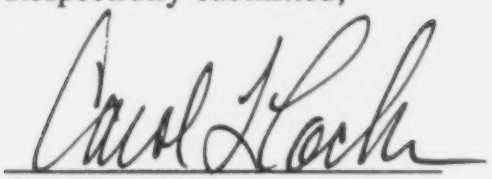
benefits under the amendment intentionally denied benefits to Petitioner, while paying benefits to other widows who also have remarried and who also vested before the effective date of the amendment. Such arbitrary and irrational discrimination between members of the same class of beneficiaries cannot be defended and certainly cannot correctly be disposed of by summary judgment.

A decision resolving disputed fact issues in favor of the movant, erroneously applying a retroactivity analysis to the facts of this case, and ignoring causes of action not disposed of by the court's analysis stretches this Court's federal summary judgment standard way beyond anything ever intended by the Summary Judgment Trilogy. Such precedent endangers the most fundamental right: the right to trial by jury and to have one's day in Court.

CONCLUSION

The decision below conflicts with decisions of this Court and other circuit courts on important federal questions and even conflicts with other decisions of the Fifth Circuit Court of Appeals on the same issues. Both courts below departed so far from the accepted and usual course of judicial proceedings in denying Petitioner the fundamental right to litigate her pension claim that this Court's power of supervision should be exercised. For the reasons stated in this Petition, Petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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